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December 4, 2009

Via Electronic Mail

Mr. Fali S. Nariman
Professor S. James Anaya
Mr. John R. Crook
c/o Ms. Katia Yannaca-Small
Secretary of the Tribunal
International Centre for Settlement of Investment Disputes
1818 H Street N.W.
Washington, D.C. 20433

RE: Grand River Enterprises Six Nations, Ltd., et al. v. United States of America

Dear Members of the Tribunal:

We write with apologies for the need to bring this motion, the seriousness of which will be borne out in our submissions below. The purpose of this motion is to petition the Tribunal to issue an order that safeguards the due process rights of Claimant Arthur Montour in respect of the Respondent's planned cross-examination of him at the oral hearing scheduled for February 2010.

The Claimants are very mindful of the Tribunal's determination that these proceedings should be concluded as soon as possible, as indicated in its last correspondence to the parties. They are, themselves, all too eager to see a full, fair and efficacious resolution of their claims. Nevertheless, over the past calendar year the Respondent has quietly taken steps external to this arbitration that now – fully revealed – seriously threaten the Claimants' right to a full and fair hearing of their NAFTA claims.

The Respondent's 2009 Decision to Initiate Criminal Prosecutions Against Claimants

Without informing Mr. Montour, the Respondent decided to have its original indictment of him issued on what would have been the day he appeared for cross-examination before the Tribunal in this NAFTA arbitration. A further "superseding" indictment, which added new allegations against Mr. Montour, followed in September. In addition, the Superseding Indictment also added both Claimant Kenneth Hill and the elderly father of Claimant Jerry Montour as criminal co-defendants.¹

¹ Attached at Tab 1.
{10539238:2}

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The Respondent's sudden decision to quietly initiate a federal criminal prosecution of Claimants Hill and Montour in Washington State arises directly out of the same circumstances that lie at the heart of the NAFTA dispute. The text of the Superseding Indictment demonstrates how many of the allegations of fact underlying the Respondent's criminal prosecution of Messer's, Montour, Montour and Hill mirror the evidence already provided by witnesses for both parties in the NAFTA proceeding, including both the nature and operation of the Claimants' investments and the applicability of state law to them. There is no dispute that under United States criminal law any testimony by Mr. Montour in this proceeding could be used against him in the pending criminal prosecution. As such, it is simply not possible for Mr. Montour to participate in a cross-examination before the NAFTA Tribunal so long as he remains subject to the peril of Respondent's new prosecution against him.

The Respondent's criminal prosecution of the Claimants rests upon a theory that an Indigenous investor and/or trader can actually be convicted for "trafficking" and for "conspiracy to traffic" cigarettes under section 2342(a) of Title 18, United States Code, whenever: (1) a state government deems his branded cigarettes to be "contraband" under its own rules; and (2) the cigarettes in question have been sold in territory over which the state claims jurisdiction. That the business activity at issue actually involves Indian-to-Indian wholesale transactions conducted solely on sovereign indigenous territory does not appear to have any bearing on the Respondent's position.

As such, it must be expected that the Respondent would use evidence, provided by Mr. Montour in his upcoming cross-examination, in its criminal prosecution against him, Mr. Hill and the elder Mr. Montour. The Respondent's theory of criminal liability is blatantly unconstitutional, because it ignores the international, constitutional, treaty and statutory rights of Indians to engage in trade amongst themselves on their own territories, and because it effectively extends state government jurisdiction over the entire indigenous tobacco trade. Nevertheless, the very real prospect of losing both his livelihood and his personal freedom, in the event that he is convicted by a Federal Court in distant Washington State, will prevent Mr. Montour from submitting to any cross-examination by the Respondent in a NAFTA arbitration while such criminal charges remain pending.

Freedom from Self-Incrimination

Mr. Montour's right to be free from being compelled to provide evidence that could be used against him is enshrined in US municipal jurisprudence arising from the Fifth Amendment to the United States Constitution. The Respondent has already acknowledged the existence of such a right, in its municipal law, before another NAFTA Tribunal.² These Constitutional protections

² *The Loewen Group and Raymond Loewen v. U.S.A.*, ICSID Case No. ARB(AF)/98/3, Respondent's Rejoinder on the Merits, 27 August 2001, at note 20. See:

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would also be relevant to a supervisory court as part of the *lex loci arbitri* of the arbitration, which is being conducted in the United States.³

More importantly, Mr. Montour's rights are also explicitly enshrined in Article 14(3)(g) of the *International Covenant on Civil and Political Rights*, which provides:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(g) Not to be compelled to testify against himself or to confess guilt.⁴

Under NAFTA Article 1131(1), the Tribunal must be guided in its resolution of disputes between the parties by the applicable rules of international law, which the circumstances dictate must include fundamental rights to a fair trial enshrined in international law. The privilege of a person to avoid self-incrimination in a legal proceeding has also been recognized by the European Court of Human Rights as part of the fundamental right to a fair trial under the *European Convention on Human Rights*,⁵ as well as in Canada.⁶

In United States municipal law, the Fifth Amendment privilege has not only been construed so as to permit a person to refuse to testify against himself in criminal proceedings; it has also routinely been found to privilege him "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."⁷ Because US courts have long observed that the Fifth Amendment must be accorded a liberal construction in favour of the right it secures, the privilege against self-incrimination extends to any answer given in a civil dispute context that would furnish "a link in the chain of evidence" in the criminal context.⁸

<http://naftaclaims.com/Disputes/USA/Loewen/LoewenUSRejoinderReMerits.pdf>; visited 2 December 2009.

³ The Tribunal has yet to make a decision as to whether the *situs* of the arbitration is Washington, D.C. or New York, NY, the alternative locations recommended by the parties. There is consensus, however, that the site of the arbitration shall be in the United States and, as such, supervision would be effected, under the *United States Federal Arbitration Act*, by recourse to a United States Federal Court.

⁴ *International Covenant on Civil and Political Rights*, 16 December 1966. (entry into force: 23 March 1976), U.N.T.S. No. 14668, vol 999 (1976).

⁵ *Murray v United Kingdom* (1996) 22 EHRR 29, 43.

⁶ *R v Chambers* [1990] 2 SCR 1293.

⁷ *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984).

⁸ *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

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Under US municipal law, the “privilege against self-incrimination does not depend upon the *likelihood*, but upon the *possibility* of prosecution.”⁹ US courts have accordingly stayed civil damages proceedings in cases where testimony on a topic could be used in a criminal prosecution, or even which could lead to other evidence that could be used in that manner.”¹⁰ US Courts have also found that a stay “is most appropriate where the subject matter of the parallel civil and criminal proceeding or investigation is the same.”¹¹ In the present case, the overlap is virtually one-to-one. On the Respondent’s new interpretation of USC Title 18, virtually any answer given by Mr. Montour in cross examination before the NAFTA Tribunal becomes fodder for the Respondent to use against him, as well as Claimant Kenneth Hill, in the criminal trial which has been set down for May 2010.

Given all of the above, the Claimants recently contacted the Respondent to request it to agree to reschedule the oral hearing so that the hearing in this matter and the cross-examination of Mr. Montour could take place after his criminal trial has been held. The Claimants’ suggestion was accordingly for the parties to agree upon postponing the hearing until July or August 2010, pending consultation with the Tribunal about the availability of its members. The Respondent has refused this request.

By Conjuring Up a Collateral Criminal Case Against Claimants, The Respondent is Committing an Abuse of Right, Contrary to International Law

Throughout the entirety of the NAFTA arbitration, the Respondent never once indicated that the Claimants’ investment activities constituted a criminal act under United States federal law. It alleged that the Claimants’ activities were contrary to state regulation and not protected under international law, including the Respondent’s obligations towards Indigenous peoples. It also

⁹ *Doe v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000).

¹⁰ *Ibid.* See, also: *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995); and *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 354 (2000).

¹¹ *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 357 (2000); citing *United States v. Private Sanitation Indus. Ass’n of Nassau/Suffolk, Inc.*, 811 F. Supp. 802, 806 (E.D.N.Y. 1992). See, also: *See Continental Ins. Co. v. Cota*, No. 08-2052 SC, 2008 WL 4298372, at *2 (N.D. Cal. Sept. 19, 2008) (ordering stay where adjudication of cross complaint would “implicate many of the factual issues underlying the criminal action”); *Taylor, Bean & Whitaker Mortgage Corp. v. Triduanum Financial, Inc.*, No. CIV 2:09-cv-0954 FCD EFB, 2009 WL 2136986, at *2 (E.D. Cal. July 15, 2009) (ordering stay of civil proceedings arising from course of conduct that is the subject of criminal investigation because “the pending civil litigation may substantially implicate defendants’ Fifth Amendment rights against self-incrimination, create unnecessary complexities with respect to discovery, expose defendants’ strategy or theories with respect to the criminal case, or otherwise prejudice the pending criminal proceedings”).

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claimed that the Claimants had no reasonable expectation that state governments could not impose measures that interfered with indigenous commerce. However, it never even so much as hinted at the possibility criminal indictments could be obtained against Messer's, Montour, Montour and Hill for doing nothing more than exercising their rights to engage in the tobacco trade on sovereign Indian land in the United States.

It would appear that the Respondent originally planned to surprise Mr. Montour in July 2009, by subjecting him to a one-day cross-examination about events that only the Respondent knew would form the grounds for its impending criminal prosecution of him. Mr. Montour was not informed of the Respondent's plans, which included indicting him on the very same day he was supposed to be cross-examined. The Respondent now insists that its cross examination of Mr. Montour must take place in February 2010, even though his criminal trial is scheduled to take place during the first two weeks of May 2010. Given the manner and timing of this collateral criminal prosecution, the Claimant submits that Respondent is engaged in an ongoing *abus du droit*, contrary to the general principle of good faith and the Claimant's basic rights of due process under international law, NAFTA Article 1115 and Article 15 of the UNCITRAL Arbitration Rules.

The Finding Requested:

Nevertheless, the Tribunal does not need to make a finding that the Respondent's surprise collateral criminal prosecution of Messer's Montour, Montour and Hill constitutes an abuse of rights under international law. The Claimants have not pled enforcement of Title 18 of the United States Code as a breach of the NAFTA – primarily because they had no idea that the current prosecution would be taking place until the Respondent placed it in motion earlier this year. As such it would lie for a different tribunal to make such a determination at some point in the future.

Given the limited nature of the remedy being sought, it would be enough for the Tribunal to recognize that Arthur Montour possesses a fundamental right against self-incrimination under applicable international law, and that all reasonable steps must be taken to ensure that his right is not unnecessarily violated.

By bringing a collateral criminal prosecution of the Claimants, the Respondent has effectively presented Arthur Montour with a Faustian choice: he can **either** submit to cross-examination before the NAFTA Tribunal in February, with the threat of incarceration hanging over his every word, **or** he can exercise his privilege against self-incrimination, suffering the Respondent's immediate and inevitable demand that the entirety of his evidence must be struck from the record. By now threatening to jail Mr. Montour and Mr. Hill, for pursuing the same rights they have asserted and utilized for years as Haudenosaunee tobacco traders, the Respondent is attempting to subvert the Claimants' right to a fair adjudication of their claims pursuant to NAFTA Article 1115, Article 15 of the UNCITRAL Arbitration Rules and the applicable rules

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of international law.

Again, it is not necessary for the Tribunal to find that the Respondent is now unsubtly attempting to intimidate Mr. Montour in order to sabotage his cross-examination. The Tribunal need only decide that Mr. Montour finds himself in an untenable position, with his NAFTA cross-examination scheduled to take place a mere three months before his criminal trial is scheduled to take place and that, as such, his due process rights are likely to be impinged upon, contrary to the applicable rules of international law.

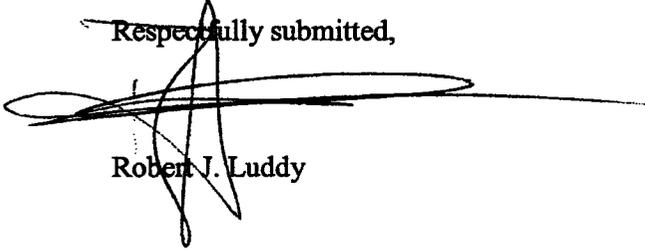
The Relief Requested:

The Claimants respectfully request that the Tribunal:

Issue an order directing the parties to agree upon a date for the oral hearing that is subsequent to the pending criminal trial of Messer's, Hill and Montour, and which is convenient to the Tribunal members; or

In the alternative, issue a declaration that it will not be prepared to entertain a motion to strike, or to accord less weight to, Arthur Montour's existing evidence on the record, merely on the basis that he exercises his right against self-incrimination by abstaining from participating in the Respondent's planned cross-examination of him at the oral hearing if held in February; and in any event, an award of costs to the Claimants in respect of this motion.

Respectfully submitted,



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